

HON. JOHN C. COUGHENOUR



11-CV-02076-LTR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RE SOURCES FOR SUSTAINABLE
COMMUNITIES,

Plaintiff,

v.

PACIFIC INTERNATIONAL
TERMINALS, INC.,

Defendant,

No. C11-2076-JCC

CONSENT DECREE

I. STIPULATIONS

Plaintiff RE Sources for Sustainable Communities ("RE Sources") sent a 60-day notice of intent to sue letter to defendant Pacific International Terminals, Inc. ("PI Terminals") on October 3, 2011, and filed the Complaint in this action on December 12, 2011 ("Complaint"). The Complaint alleged violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, relating to the discharge of fill material to wetlands constituting waters of the United States at PI Terminal's property at Cherry Point in Whatcom County, Washington, and seeking declaratory and injunctive relief, civil penalties, and attorneys fees and costs.

Solely for the purpose of this Consent Decree ("Decree"), and for no other purpose, PI Terminals admits liability for the unpermitted discharge of fill to 1.2 acres of wetlands in

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violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

RE Sources and PI Terminals agree that settlement of these matters is in the best interest of the parties and the public and that entry of this Decree is the most appropriate means of resolving this action.

RE Sources and PI Terminals stipulate to the entry of this Decree without trial or adjudication of any issues of fact or law regarding RE Sources' claims or allegations set forth in its Complaint and its 60-day notice.

DATED this 24th day of July, 2013

GORDON THOMAS HONEYWELL

SMITH & LOWNEY PLLC

By s/Bradley B. Jones
Bradley B. Jones, WSBA #17197
Attorneys for Defendant Pacific
International Terminals, Inc.

By s/Richard A. Smith
Richard A. Smith, WSBA #21788
Attorneys for Plaintiff RE Sources for Sustainable
Communities

PACIFIC INTERNATIONAL
TERMINALS, INC.

RE SOURCES FOR SUSTAINABLE
COMMUNITIES

By Kyle B. Lukins
NAME, TITLE
Kyle B. Lukins, V.P. - General Counsel

By Erina Hoyer
NAME, TITLE
Erina Hoyer, Executive Director

II. ORDER AND DECREE

THIS MATTER came before the Court upon the foregoing Stipulations of the parties. Having considered the Stipulations and the promises set forth below, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

1. This Court has jurisdiction over the parties and subject matter of this action.
2. Each signatory for the parties certifies for that party that he or she is authorized to enter into the agreements set forth below.

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1 3. This Decree applies to and binds the parties and their successors and assigns.

2 4. This Decree and any injunctive relief ordered within will apply to Defendant PI
3 Terminals' operation and oversight of the property it owns at Cherry Point, Whatcom County,
4 Washington, in Sections 17, 18, and 19, Township 39 North, Range 01 East, which is the location
5 of PI Terminals' proposed Gateway Pacific Terminal ("GPT site").
6

7 5. This Decree is a full and complete settlement of all the claims in the Complaint,
8 the 60-day notice, and all other claims known and unknown existing as of the date of entry of this
9 Decree that could be asserted under the Clean Water Act, 33 U.S.C. §§ 1251-1387 or any other
10 state or federal law arising from activities conducted in June and July 2011 relating to or
11 constituting PI Terminals' geotechnical investigation of the GPT site.

12 6. This Decree is a settlement of disputed facts and law. Aside from PI Terminals'
13 admission of liability on page one of this Decree solely for the purpose of entering the Decree, it
14 is not an admission or adjudication regarding any allegations by RE Sources in its Complaint, this
15 case, or of any fact or conclusion of law related to those allegations.
16

17 7. PI Terminals agrees to the following terms and conditions in full and complete
18 satisfaction of all the claims covered by this Decree:

19 a. Other than activities necessary for wetlands restoration and mitigation, PI
20 Terminals will not perform or authorize any activities in wetlands at the GPT site in
21 violation of wetlands protection laws.

22 b. PI Terminals will commence restoration of the wetlands damaged by its
23 June/July 2011 geotechnical exploration during the first Fall planting season (i.e.,
24 approximately September 15th through November 15th in any year) that commences at
25 least 60 days after the Army Corps of Engineers issues an after-the-fact permit coverage
26 authorizing such work and gives final approval to a restoration plan, Whatcom County has

1 issued a land disturbance permit that authorizes the work and the Department of Ecology
 2 concludes its Section 401 certification process.. PI Terminals will conduct the restoration
 3 in accordance with the *Critical Areas Study and Restoration Plan*, dated June 15, 2012
 4 (Rev. 3, AMEC) that is Attachment "A" to this Decree, and any amendments thereto as
 5 may be required by Whatcom County, the Department of Ecology, or the Army Corps of
 6 Engineers.
 7

8 c. PI Terminals will enhance and set aside 2.9 acres of wetlands previously
 9 identified at the GPT property that were not affected by the June/July 2011 geotechnical
 10 investigation in accordance with the *Wetlands Mitigation Plan for Temporal Loss*, dated
 11 June 7, 2012 (Rev., AMEC) that is Attachment "B" to this Decree, and any amendments
 12 thereto as may be required by the Department of Ecology provided, however, that if such
 13 amendment changes the location of the acreage to be set aside, PI Terminals must agree to
 14 the relocation. Implementation of Attachment B will commence during the first Fall or
 15 Spring planting season (i.e., approximately March 15th through May 15th in any year) that
 16 commences at least 60 days after the Army Corps of Engineers issues a verification of
 17 after-the-fact permit coverage to PI Terminals, Whatcom County has issued a land
 18 disturbance permit that authorizes the work and the Department of Ecology formally
 19 approves the mitigation plan and concludes its Section 401 certification process.
 20

21 d. Not later than December 31st of the first year of implementation of the
 22 enhancement to the 2.9 acre wetland mitigation site, PI Terminals will record with the
 23 Whatcom County Assessor a deed restriction similar to the form of Attachment "C" to this
 24 Decree and meeting Assessor's recording requirements for such a deed restriction.

25 e. RE Sources agrees that it will not appeal any retroactive authorization
 26 (by permit, verification of permit coverage, or otherwise) for work performed in June

1 and July 2011 as part of the geotechnical investigation or such authorization for
2 restoration relating to such work.

3
4 8. Not later than 5 days after the effective date of this Decree as defined in Section
5 13, PI Terminals will pay \$825,000 to The Rose Foundation for construction of physical projects
6 or other on the ground work for physical improvements for Puget Sound environmental benefit,
7 including associated administrative and land acquisition costs as described in Attachment "D" to
8 this Decree. Checks will be made to the order of and delivered to: The Rose Foundation, 1970
9 Broadway, Suite 600, Oakland, CA 94612. Payment will include the following reference in a
10 cover letter or on the check: "Consent Decree, RE Sources v. Pacific International Terminals,
11 Inc." A copy of the check and cover letter will be sent simultaneously to counsel for RE Sources.

12 9. PIT will pay RE Sources' attorney and expert fees and costs in the amount of
13 \$775,000. Payment will be made within 5 days of the effective date of this Decree as defined in
14 Section 13 by check payable and mailed to Smith & Lowney, PLLC, 2317 East John St., Seattle,
15 WA 98112, attn: Richard A. Smith. This payment is full and complete satisfaction of any claims
16 RE Sources may have under the Clean Water Act for fees and costs for this case through entry of
17 this Decree. As a condition precedent of the payment required under this paragraph, Plaintiff's
18 counsel will provide a sworn affidavit that their contemporaneous time records of fees and costs
19 exceed the \$775,000.

20
21 10. In the case of a force majeure event, PI Terminals will be given a reasonable
22 extension of time to perform tasks 7(b) or (c) above. A force majeure event is any event
23 outside the reasonable control of PI Terminals that causes a delay in performing tasks
24 required by this Decree that cannot be cured by due diligence. Delay in performance of a
25 task required by this Decree caused by a force majeure event is not a failure to comply with
26 the terms of this Decree, provided that PI Terminals notifies RE Sources of the event. The

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1 notice will include a description of the event causing the delay, the steps that PI Terminals
 2 will take to respond to the event and perform the task, the projected time that will be needed
 3 to complete the task, and the measures that have been taken or will be taken to avoid or
 4 minimize any impacts to wetlands and water quality resulting from the event and the resulting
 5 delay in completing the task.
 6

7 PI Terminals will notify RE Sources of the occurrence of a force majeure event as soon as
 8 reasonably possible but, in any case, no later than 15 days after the occurrence of the event. In
 9 such event, the time for performance of the task will be extended for a reasonable period of time
 10 following the force majeure event.

11 By way of example and not limitation, force majeure events include

- 12 a. Acts of God, war, terrorism, insurrection, or civil disturbance;
- 13 b. Earthquakes, landslides, fire, floods;
- 14 c. Actions or inactions of third parties over whom defendant has no control;
- 15 d. Unusually adverse weather conditions;
- 16 e. Restraint by court order or order of public authority;
- 17 f. Strikes;
- 18 g. Any task requiring the approval of a regulatory authority or tribe, where
 19 such approval is not granted or is delayed and where PI Terminals has timely and in good faith
 20 sought approval; and
 21
- 22 h. Litigation, arbitration, appeals, or mediation that causes delay.

23 11. This Court retains jurisdiction over this matter. While this Decree remains in
 24 force, this case may be reopened without a filing fee so that the parties may apply to the Court for
 25 any further order that may be necessary to enforce compliance with this Decree or to resolve any
 26 dispute regarding the terms or conditions of this Decree. In the event of a dispute regarding

1 implementation of or compliance with this Decree, the parties must first attempt to resolve the
2 dispute by meeting to discuss the dispute and any suggested measures for resolving the dispute.
3 Such a meeting should be held as soon as practical but must be held within 30 days after notice of
4 a request for such a meeting to the other party and its counsel of record. If no resolution is
5 reached within 30 days from the date that the notice of dispute is served, the parties may resolve
6 the dispute by filing motions with the Court. The prevailing or substantially prevailing party in
7 such motions will be entitled to its reasonable attorneys fees and costs, including expert fees.
8

9 12. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), no consent
10 judgment may be entered in a Clean Water Act suit in which the United States is not a party
11 before 45 days following the receipt of a copy of the proposed consent judgment by the U.S.
12 Attorney General and the Administrator of the U.S. EPA. Therefore, upon the filing of this
13 Consent Decree by the parties, RE Sources will serve copies of it upon the Administrator of the
14 U.S. EPA and the Attorney General.

15 13. This Decree will take effect upon entry by this Court and the passage of 30 days
16 without any appeal or, if appealed, the resolution of that appeal in a manner that maintains the
17 terms of this Decree without change. It terminates three years after that date, or 90 days after the
18 parties' completion of all obligations imposed by this Decree, except for long term monitoring
19 and maintenance of the restoration and mitigation elements, whichever is later. PI Terminals may
20 provide written notice to RE Sources of its completion of all obligations, and RE Sources will
21 have 60 days to provide a written response should it dispute that PI Terminals obligations are
22 complete. In the event of a dispute over the completion of PI Terminals' obligations and the
23 termination of this Decree, either party may resort to the dispute resolution provisions of
24 Paragraph 11.
25

26 14. Both parties have participated in drafting this Decree.

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1 15. This Decree may be modified only upon the agreement of the parties and approval
2 of the Court.

3 16. If for any reason the Court should decline to approve this Decree in the form
4 presented, this Decree is voidable at the discretion of either party. The parties agree to continue
5 negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this
6 Decree.
7

8 17. Notifications required by this Decree must be in writing. The sending party may
9 use any of the following methods of delivery: (1) personal delivery; (2) registered or certified
10 mail, in each case return receipt requested and postage prepaid; (3) a nationally recognized
11 overnight courier, with all fees prepaid; or (4) e-mail. For a notice or other communication
12 regarding this decree to be valid, it must be delivered to the receiving party at one or more
13 addresses listed below or to any other address designated by the receiving party in a notice in
14 accordance with this paragraph 17.

15 **if to RE Sources:**

16 Crina Hoyer
17 RE Sources for Sustainable Communities
18 2309 Meridian St.
19 Bellingham WA 98225

20 **and to:**

21 Richard A. Smith
22 Smith & Lowney PLLC
23 2317 East John St.
24 Seattle, WA 98112
25 email: rasmithwa@igc.org
26

1 **if to PI Terminals:**

2 Kyle Lukins
3 SSA Marine Inc.
4 1131 SW Klickitat Way
Seattle, WA 98134

5 **and to:**

6 Bradley B. Jones
7 Gordon Thomas Honeywell, LLP
8 1201 Pacific Avenue, Suite 2100
PO Box 1157
Tacoma, WA 98401
Email: bjones@gth-law.com

9 A notice or other communication regarding this Decree will be effective when received,
10 unless the notice or other communication is received after 5:00 p.m. on a business day or on a day
11 that is not a business day, in which case the notice will be deemed received at 9:00 a.m. on the
12 next business day. A notice or other communication will be deemed to have been received (a)
13 upon receipt as indicated by the date on the signed receipt if it is delivered in person or sent by
14 registered or certified mail or by nationally recognized overnight courier;; or (b) if the receiving
15 party rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in
16 address for which no notice was given, then upon that rejection, refusal, or inability to deliver; or
17 (c) for notice provided via e-mail, upon receipt of a response by the party providing notice or
18 other communication regarding this Decree.
19

20 ENTERED this 1 day of Oct 2013.

21
22 
23 HON. JOHN C. COUGHENOUR
24 UNITED STATES DISTRICT JUDGE
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26

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